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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 608

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent

BRIEF FOR PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Reported Opinions Below

The only reported opinion of the courts below is that of the Court of Civil Appeals for the First Supreme Judicial District of Texas, which was rendered on March 8, 1956, and is reported in 288 S.W. (2d) 579.

Jurisdiction

The Supreme Court of Texas is the highest court of Texas in which a decision herein could be had. Its order overruling Petitioner's Motion for Rehearing was entered July 11, 1956. 28 U.S.C.A. 2101(C). The Petition for Writ of Certiorari was filed herein on October 6, 1956; and the writ was granted on December 3, 1956.

Jurisdiction to review this case upon Writ of Certiorari

is conferred upon this Court by Title 28 U.S.C.A., Sec. 1257(3).

The validity of a state statute of the State of California is in question on the ground of its being repugnant to the Constitution of the United States, and the decision sought to be reviewed is against the validity of the statute.

Constitutional Provision and Statutes Involved

Section one, Fourteenth Amendment to the Constitution of the United States of America.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Insurance Code of California, Sections 1610-1620; Deerings Insurance Code of California, Ann., Sec. 1610-1620.

See Appendix "A."

Question for Review

The only question for review is whether or not the final judgment of a court of competent jurisdiction in California, which judgment is valid on its face, is void for want of jurisdiction in the California Court. It can only be void if the service of process provisions of the California Unauthorized Insurers' Process Act are unconstitutional under Section One of the Fourteenth Amendment to the Constitution of the United States of America.

Statement of the Case

This is a suit on a final judgment obtained in a California Court. (Tr. pps. 1-6, 20).

Briefly, Lowell Stepp Franklin, deceased, had a policy of insurance with Respondent, which provided for payment on accidental death. His mother, Petitioner here, was the named beneficiary in the policy. (Tr. pps. 17, 22). The original policy involved was issued by Empire Mutual Insurance Company to the deceased on April 21, 1944. (Tr. pps. 16, 21-23). The policy was re-insured by the Respondent on September 1, 1948. (Tr. pps. 16-17, 33-34). Respondent continued to mail premium-due notices from Texas to Franklin in California, and Franklin mailed his premiums from California to Respondent in Texas. (Tr. p. 17). The California Unauthorized Insurers' Process Act became effective October 1, 1949. (Tr. pps. 54-59). Thus, this policy by this unauthorized insurer was in full force prior to the effective date of the California Unauthorized Insurers' Process Act. Lowell Stepp Franklin died December 1, 1950 (Tr. p. 17).

When the Respondent failed to pay the proceeds of the policy to Petitioner (Tr. p. 17), after Franklin's death, she filed suit on the policy in California. (Tr. pps. 18, 44-47). Proper service (Tr. pps. 18-19, 47-50) was had on Respondent under the provisions of the California Unauthorized Insurers' Process Act (Tr. pps. 54-59). After Respondent failed to appear and answer (Tr. p. 19), a default judgment was taken. (Tr. pps. 20, 50-51). It was upon this final default judgment that suit was filed in Texas (Tr. pps. 20, 1-4).

The case below was tried upon a stipulation of fact. (Tr. pps. 15-59).

The constitutional question was first raised in the trial court by the Respondent's pleadings (Tr. pps. 6-13), the

trial court holding for the Respondent and against the validity of the statute. (Tr. pps. 13-15). It was next raised in the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, Texas by the briefs of both parties. (Appellant's and Appellee's Briefs). After that court also held against the validity of the statute, (Tr. pps. 61-68), the question was raised by Petitioner's Motion for Rehearing before that Court (Tr. pps. 68-70). The question was raised in the Supreme Court of Texas both in the Pefition for Writ of Error (Tr. pps. 70-85) and Petitioner's Motion for Rehearing (Petitioner's Motion for Rehearing on Application for Writ of Error).

ARGUMENT

A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a State as to causes of action arising out of such acts or such ownership, if a statute of the State so provides at the time when the cause of action arises without doing violence to Section One of the Fourteenth Amendment to the Constitution of the United States of America.

With each advancement in the ease and speed of travel and the means of communication, there has been an increase in the movement of people from state to state, and an increase in the amount of "business" that is conducted by telephone, telegraph and the mails. While we know of no statistics on the matter, we are confident that the court will take judicial knowledge of the fact that a substantial amount of business today is conducted across state lines by use of the United States mail service. This is especially true in the insurance business. The United States mail has in large measure taken over the jobs once performed by the insurance salesmen, collectors, etc. Regula-

tion of this "mail-order" insurance business has long been a legislative problem in the various states.[1] Relying upon *Pennoyer* vs. *Neff*, 95 U.S. 714, 24 L. Ed. 565, the insurance fraternity has argued that the United States mail service provided a sanctuary, a no-man's-land, into which the states were powerless to reach in an effort to protect the interest of their citizens. In an effort to solve the problem thus presented, the National Association of Insurance Commissioners, an organization of public officials in the various states, whose jobs are to oversee and regulate the insurance business, sponsored the passage of a Uniform Unauthorized Insurers' Process Act. With only slight variations in the text; thirty-eight of the forty-eight states have now adopted this Uniform Unauthorized Insurers' Process Act; California being among these thirty-eight states.

In our view, the basic authority for the constitutionality of the type of service of process here involved is to be found in *Virginia* v. *Travelers Health Association*, 339 U.S. 643, 70 S.Ct. 927, and the cases there cited. The Travelers Health Association case was decided by this Honorable Court in 1950.

In the Travelers Health Association case, the fact situation is strictly one of "mail-order" insurance business conducted by mail between the Nebraska home office of the insurance company and citizens of Virginia, and vice versa. Except for this activity, the Travelers Health Association was not "present" in Virginia and was not "doing business" in Virginia. The service of process method employed by Virginia, as is here the case, was upon the Secretary of the Commonwealth of Virginia, who, in turn, served the Travelers Health Association with process by

[1] For some statistics indicating the magnitude of the insurance business see *U. S.* v. *South-Eastern Underwriters Ass'n*, 64 S.Ct. 1162, 1166-68, 322 U.S. 533.

registered mail. It was the contention of the Travelers Health Association that under these facts, Virginia had no "power" to reach it under Section One of the Fourteenth Amendment to the Constitution of the United States of America. With this contention, we think, this Honorable Court disagreed. In doing so, among other things, the Court said:

> "* * * where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state * * * (p. 929).
>
> "* * * And in International Shoe Company v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 161 A.L.R. 1057, this Court, after reviewing past cases concluded: 'Due process requires only that in order to subject a Defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'
>
> "Measured by the principles of The Osborn, Hoopeston & International Shoe Cases, the contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justifies subjecting appellants to cease and desist proceedings under paragraph 6. * * *
>
> "*Moreover, if Virginia is without power to require this association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policy*

*holders could afford the expense and trouble of a Nebraska lawsuit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would more likely live and where claims for losses would presumably be investigated * * *. And prior decisions of this court have referred to the unwisdom, unfairness and injustice of permitting policy holders to seek redress only in some distant state where the insurer is incorporated. The due process clause does not forbid a state to protect its citizens from such injustice.* (p. 930)."

However, the Galveston Court of Civil Appeals took the position that this case is not "factually analogous to, or legally applicable to the present case," and that it is not "any authority for the proposition that the requirement of due process has been met in this present case." In so holding, the Galveston Court seized upon this language in the concurring opinion of Justice Douglas (339 U.S. 644):

> "Since the formula adopted by the Court is adequate to dispose of this case, I have joined in the opinion. But I feel that the type of problem presented requires a more selective treatment. Hence my separate opinion."

It seems clear to us that the majority opinion by Justice Black is "factually analogous" to and, "legally applicable" to the present case, and is "authority for the proposition that the requirement of due process has been met in this present case." Obviously, the question revolves around the concurring opinion of Justice Douglas. We think it apparent that Justice Douglas was no basically in disagreement with Justice Black's opinion, but felt that Virginia's power to regulate required far less "minimum

contacts," than he thought Justice Black's opinion was requiring, for he said:

> "The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to Appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. *His ability to sue is not necessarily the measure of Virginia's power to regulate.*
>
> "Whether such solicitation is isolate or continuous, it is activity which Virginia can regulate."

We feel that if the Galveston Court is correct in saying that this Honorable Court has not decided the question involved here, then the question should be decided in view of the very large number of states having statutes of the kind involved here. On the other hand, if we be correct in our construction of the Travelers Health Association case, supra, then the Galveston Court has clearly decided this case is a way not in accord with the opinion of this Honorable Court in that case.

So far as we have been able to determine, only three cases have been decided by circuit courts where the constitutionality of these Unauthorized Insurers' Process Acts is involved.[2] All three cases come from the Court of Ap-

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[2] We have found two cases by District Courts where the same and a similar statute were involved. *Ace Grain Co.* v. *American Eagle Fire Ins. Co.*, 95 F.Supp. 784; *Storey* v. *United Ins. Co.*, 64 F.Supp. 896. In both cases the court held the statutes constitutional, relying on the Travelers Health Association case as authority. We have also found a few state court cases where the same or a similar statute was involved, and the statutes were held constitutional under the authority of the Travelers Health Association case. *Zacharakis* v. *Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S. 2d 418, leave to app. gr. 281 App. Div. 1019, 121 N.Y.S. 2d 271; *Suits* v. *Old Equity Life Ins. Co.*, 241 N.C. 483, 85 S.E. 2d 602; see also *White* v. *Indiana Travelers Assur. Co.*, 22 So. 2d 137.

peals for the Fifth Circuit. Parmalee v. Iowa State Traveling Men's Association, 206 F(2d) 518, 44 A.L.R. 2d 410; cert. den. 346 U.S. 877, 74 S. Ct. 125; Parmalee v. Commercial Travelers Mutual Accident Association, 206 F(2d) 523; and Berg v. Commercial Mutual Accident Association of America, 207 F(2d) 775. The following language from the opinion of the Galveston Court of the Civil Appeals adequately demonstrates the weight given to these three cases by both the trial court and the Galveston Court:

> "Appellant attacks the rational of the decision of the C.C.A. 5th Circuit upon the proposition that the Court erroneously designated the statute there involved as a 'regulatory law' whereas it is a 'procedural' law. *Whatever the court may have designated the statute, there can be no doubt but that the court was concerned with the question of due process.* And further, there can be no doubt but that under analagous factual situations, that court has thrice held compliance with similar statutes not to constitute due process. *We rest our decision of the present case upon that authority.*"

Surprisingly enough, in those cases, the 5th Circuit Court apparently agreed with our analysis of the Travelers Health Association opinion by this Honorable Court and cited it as authority. On the other hand, the Galveston Court relied upon one of the refinements made by the 5th Circuit cases, but rejected its view on the applicability of the Travelers Health Association case. An analysis of the three cases is certainly in order; and since the 5th Circuit Court actually wrote for all three cases in the Iowa State Traveling Men's Association case, supra, we shall concern ourselves only with that case.

While holding the Unauthorized Insurers' Process Acts

constitutional and citing the Traveler's Health Association case, supra, as an authority, the court very narrowly construed the statute.

It held first that "We construe the legislation to apply only to policies of insurance delivered in Florida to Florida residents." While we do not agree that such a construction is warranted, we find no need to quarrel with it here since we have a policy of insurance "delivered" in California to a California "resident."

Next the court sought to construe the act to apply only to suits "arising out of any such contract of insurance." Such a construction is not readily apparent from the language of the statute, and the court realized this, saying:

> "While the statute refers to '*any of the following acts*' we understand it to mean rather the doing of any of the proscribed acts *from which results the issuance or delivery of a contract of insurance in the state.* The force of the statute is directed to suits upon such contracts. However, for the purposes of Section Three of the Act, *each act may have a consequence of providing means of service of process*, but then also only as to suits upon contracts delivered in Florida to Florida residents. However this may be, in the present case each and every requirement of the statute is met."

Not only does it appear that the court was indecisive about this unnecessary construction, but, it appears, the court relied only indirectly upon it in deciding the second of the Parmalee cases. Actually, this construction, as well as the other one discussed above, has the effect of literally destroying the intended purpose of the acts. But, again, for our purposes here, we need not quarrel since we have service of process based on a completed policy delivered in California to a California resident.

Finally, the court said:

> "*As a regulatory law it plainly can given no effect which will impose retroactively, the provisions of the statute upon unauthorized insurers having policies in force prior to the enactment of the statute.* The distinctions are not hypothetical, but are substantial in the proper application of the statute. *They mark the line between due process and unauthorized state action.*"

It is with this language that we must be concerned here since it is the only test laid down by the Fifth Circuit which the instant case does not meet, and since the Texas courts felt obligated to follow the holding of the Fifth Circuit cases.

The issue is clear cut since the policy issued by this unauthorized insurer was in force prior to the effective date of the California Unauthorized Insurers' Process Act.

The first error into which the Court fell in this last proposition is in designating the act as a "regulatory law." *The act is wholly procedural, dealing only with process, the service of it, and the method of defense in such a case.*

NO ONE HAS A CONSTITUTIONAL, OR VESTED RIGHT NOT TO BE SUED.

The Constitution of the United States neither protects nor guarantees any particular form or method of procedure, but is satisfied if the litigant be given reasonable notice and a reasonable opportunity to be heard before judgment. See State of Missouri ex rel. *Hurwitz* v. *North, et al, Board of Health of State of Missouri*, 271 U.S. 40, 46 S.Ct. 384; *Hurtado* v. *People of the State of California*, 110 U.S. 516, 4 S.Ct. 111; *Louisville and Nashville Railroad Co.* v. *Schmidt*, 177 U.S. 230, 20 S.Ct. 620; *Iowa Cent. Ry. Company* v. *State of Iowa*, 160 U.S. 389, 16 S.Ct. 344; *Honeyman* v. *Hanan*, 302 U.S. 375, 58 S.Ct. 273.

That statutes relating to service of process are procedural only is well-settled. That a procedural statute operates retroactively does not make it invalid, unless it disturbs some vested right, is also well settled.

"*Statutes relating to the service of process, as for example, providing a new or more convenient method of service * * * relate to a mere matter of procedure, and therefore to not disturb vested rights.* 16 CJS 1257, para. 263.

"Except as they may be expressly protected by constitutional provisions, *no one has a vested right in the rules of practice or modes of procedure in force when a cause of action arises or suit is brought, and such rules of practice or modes of procedure may be amended, altered, or repealed, and others substituted in their place, and the changes made applicable to pending actions at any time before the final judgment of the court becomes effective, or at least before vested rights have been acquired* under them, provided an adequate remedy or the essential elements of protection remain. * * * Unless provided otherwise by the act itself, the new statute governs all proceedings had thereafter, including those in actions that have accrued and are pending at the time of its passage." 16 CJS 1254, para. 261.

"*Legislation designed to enforce performance of a contract executed prior to the enactment of the legislation does not impair the obligation of contract.*" 16A CJS 55, para. 380.

"Both in jurisdictions in which retroactive laws are expressly prohibited by constitutional provisions, and in jurisdictions in which there are no such inhibitions, it is well settled that *retroactive laws which affect only*

remedies or procedure, or relate exclusively to remedial rights, as distinguished from those affecting substantive or substantial rights, are valid provided the changes made are reasonable and and not highly injurious, oppressive or unjust, and do not disturb vested rights or impair contractual obligations, and provided that there are no special constitutional restrictions. * * *

"*Accordingly, statutes may be valid which retroactively affect matters of practice generally, venue, process, parties, defenses* * * *." 16A CJS 108, para. 418.

Moreover, both of the states involved here, California and Texas, follow this general rule. One such California case is *Lincoln* v. *Superior Court*, 39 Pac. 2nd, 405, 2 Cal. 2nd, 127 in which the plaintiff was a beneficiary under a trust deed. This was a suit to foreclose the deed. When the deed was executed, generally speaking, there was no right of foreclosure existing under the law of California. Before the bringing of this suit, however, a right of foreclosure was created by legislation. The court in holding the statute constitutional said:

"*The section is a remedial statute which merely affords a new and additional means of enforcing a right. The cases distinguish between laws which impair the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.* Bernheimer v. Converse, 206 U.S. 516, 530, 27 S.Ct. 755, 51 L.Ed. 1163. *The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A remedy afforded by a statute passed subsequent to the execution date of the contract*

may be evoked by a party to the contract who has been wronged by its nonperformance. In other words, one who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce performance of his obligation. Such legislation does not impair the obligation of the contract and is constitutional. Wilson v. Standifer, 184 U.S. 399, 410, 22 S.Ct. 384, 46 L.Ed. 612; New Orleans C. & L. Ry. Co. v. Louisiana, 157 U.S. 219, 15 S.Ct. 581, 39 L.Ed. 679; Aikins v. Kinsbury, 170 Cal. 674, 678-681, 151 P. 145; Colma Veg. Ass'n. v. Benetti, 91 Cal. App. 103, 112, 267 P. 172; Maguire v. Cuninngham, 64 Cal. App. 536, 551-553, 222 P. 838.

"That Sec. 728a, Supra, is purely remedial does not admit of doubt, as it affords, as stated above, merely a new and additional means of enforcing an existing right. The respective rights of the trustor and beneficiary are neither increased nor diminished by the section. It does not enlarge the obligation of the trustor, but only enables the trustee or beneficiary to compel the performance of that obligation."

A Texas case of particular interest on this point is the case of *New Amsterdam Casualty Company* v. *Patton*, 22 S.W.(2d) 540, 36 S.W.(2d) 1000. In that case an amendment to the Workmen's Compensation Law was involved. On November 2, 1926, Patton was injured in the course of his employment. A final award was rendered by the Industrial Accident Board on March 28, 1928. Prior to June, 1927, the Workmen's Compensation Act required Notice of Appeal from a Board award to be given both to the Industrial Accident Board and the adverse party. By an amendment, effective in June, 1927, the Act was changed so

as to require Notice of Appeal to be given only to the Industrial Accident Board. The compensation carrier, desiring to appeal from the March 28, 1928, Board award, gave Notice of Appeal only to the Industrial Accident Board. Thereafter, on May 4, 1928, the compensation carrier filed its suit to set aside the Board award. Patton contended that to apply the 1927 amendment to his claim was to give the amendment a retroactive effect. The Galveston Court of Civil Appeals, in holding against Patton, said in part:

> "* * * *while the giving of such a notice is undoubtedly a jurisdictional element* (Texas Employers Insurance Ass'n. v. Fussell (Tex. Civ. App.) 1 S.W.2d 404), *it is also essentially procedural and remedial in its nature, pertaining only to the manner in which an award may be taken on into the courts*, and not having to do with any substantive or vested rights of the adverse party; its administration in the courts, therefore, seems to us to fall within the rule applied by that class of cases holding that a mere remedy, either in or outside of the courthouse, that does not impair the obligations of a contract or other vested right may be changed at the will of the legislature without legally aggrieving any party affected thereby (Life Insurance Co. v. Wolters (Tex. Com. App.) 10 S.W.2d 698, Oldum v. Garner, 86 Tex. 374, 25 S.W. 181;" * * *
>
> "The amendment by the Fortieth Legislature in this instance took away no right from the appellee except the mere privilege of being directly served with a notice that the casualty company would not abide by the award as ending the controversy; his compensation rate was not effected, neither was his right of recovery nor status in any other substantive respect altered in any way; the single change made was in the manner in

which his adversary might perfect its resort to the courts from an award unfavorable to it."

The Commission of Appeals, in affirming the Galveston Court said:

> "The legal relation which arises between the employee, the employer and the insurer, who bring themselves within the scope of operation of the Workmen's Compensation Statutes, is contractual. * * * By implication, the statutes then existing become part of the contract. This, in a sense, includes the provisions of the statutes which deal with the matter of remedy. The law, however, does not imply a purpose on the part of the parties to make such remedial provisions a part of the 'obligation' of the contract. *In presuming that the parties entered into the contractual relation in contemplation of the remedies afforded by the statutes, the law further presumes that the power of the legislature to substitute other remedies was contemplated. Consequently, subsequent legislation which effects a change in this respect, is not rendered invalid as to said parties, by the constitutional provision against the impairment of the obligations of contracts, if an adequate remedy is left available.* Farmers Life Insurance Company v. Wolters (Tex. Com. App.) 10 S.W. 2d 698."

We consider the three 5th Circuit cases under consideration, insofar as this point is concerned, not only to be in conflict with the decisions of this court cited above, but to be in conflict with many decisions from other circuits, as well as in conflict with other decisions of the 5th Circuit Court. Because *United States* v. *Resch*, 85 F. Supp. 389, cites several of these circuit court cases, and because it applied the rule to a much more delicate situation than is

involved here, we think a reference to it to be proper. The statute involved was the Housing and Rent Act of 1947. Prior to 1949 only the tenant had the right to sue for treble damages for violation of the act. The alleged violation occurred while the act so stated, that is prior to 1949. In 1949 the act was amended to permit the government to institute suit for treble damages if the tenant failed to do so for thirty (30) days. In holding the amendment constitutional:

> "That amendment to Sec. 205 of the Housing & Rent Act of 1947 created a remedy in favor of the Government which it did not have under the 1947 Act. However, the same remedy was previous to the 1949 amendment available to the tenant by virtue of a 1948 amendment. No new penalty was created. The damages formerly recoverable by the tenant were not increased and the remedy given to the government was predicated on the failure of the tenant to bring his suit within a given time.
>
> "Congress or a state legislature may pass retroactive laws such as in their operation may affect pending suits and give to a party a remedy which he did not previously possess, or modify an existing remedy or remove an impediment in the way of legal proceedings. Landy v. United States, 6 Cir., 108 F. 2d 698, 705 cert. den. 309 U.S. 681, 60 S. Ct. 721, 84 L. Ed. 124.
>
> "Martini v. Porter, 9 Cir., 157 F. 2d 35, 40, cert. den. 330 U.S. 848, 67 S. Ct. 1091, 91 L. Ed., 606, the Court said: 'The fact that the order has a retroactive effect does not necessarily make it invalid.' Compare Paramino Lumber Co. v. Marchall, 309 U.S. 370, 60 S. Ct. 600, 84 L. Ed. 814 * * * *No vested right of appellant's was disturbed for 'there is no such thing as a vested*

right to do wrong.' See also Bowles v. Strickland, 5 Cir., 151 F. 2d 419 and Bowles v. Miller, 10 Cir., 154 F. 2d 992."

We also consider it of some weight that the Restatement of Judgments, Sec. 23 provides:

> "A court by proper service of process may acquire jurisdiction over an individual not domiciled within the state who does acts or owns things in a state which are of a sort dangerous to life or property, as to causes of action arising out of such acts or such ownership, *if a statute of the state so provides at the time the cause of action arises.* * * *
>
> "Comment (a): *The Rule stated in this section is not applicable if at the time when the cause of action arose there was no statute in the state providing for the acquiring of jurisdiction over the defendant.*

It is significant that the condition given in the Restatement of Judgments is that the statute of the state exist at the time the cause of action arises. Clearly, it is not contemplated, as the Fifth Circuit indicated, that the existence of the statute must pre-date the existence of the policy of insurance. To follow the logic of the Fifth Circuit is to destroy the time-honored distinction between matters of "remedy" and matters of "substance."

We think the second error of the Fifth Circuit Court in the Parmalee case, in saying that the effective date of the statute must pre-date the policy, was that it failed, even under its reasoning, to take into account the conduct of that unauthorized insurer between 1949, the effective date of the statute, and 1951, the date of the insured's death. So far as the facts disclose, we may assume that the insurance company there, after 1949, continued in the course of its mail order business in Florida. Certainly, it continued

its mail-order dealings with the insured after the effective date of the act, and after it was aware, or should have been aware of the existence of the act, and the consequences to it of continuing its mail-order insurance business in that state.

In this situation, we are impressed with the reasoning of the New Jersey Federal District Court in *Boches v. Miami Airline*, 111 F. Supp. 133. In that case, a New Jersey statute made the Secretary of State the service agent for non-domiciled corporations operating aircraft over New Jersey as to civil cases "arising out of or by reason of any accident or collision occurring on or over the land or waters or in the air space of this State." That statute became effective May 16, 1952. The accident causing the injuries complained of occurred December 16, 1951. Service was had on the defendant November 21, 1952. Holding the application of the statute constitutional in that situation, the court said:

> "The cases cited and the Restatement would seem to be determinative of this motion. But comparison of the case at bar with these authorities shows a rational of differentiation. Since the passage of the act above referred to, the defendant company, which previous to its passage had done business in New Jersey, has continued to carry on its aircraft operations in the state. *The question arises as to whether by such continuance the defendant may be considered to have consented to accept process through service on the Secretary of State in causes of action arising prior to May 16, 1952,* the effective date of N.J.S.A. 6:5-3. None of the cited authorities deals with this particular problem, nor has it been directly treated by the Restatement of Judgments. These would seem to apply to situations where a single act resulting in injury is casually performed,

as distinguished from acts performed by those doing business in the state. *It is the court's considered opinion that the defendant's continued operation in the state after May 16, 1952, rendered it amenable to process under N.J.S.A. 6:5-3 for causes of action arising before this date but while it was doing business in the state.*

"Defendant argues that to uphold this service would affect its vested rights. *It is hard to imagine however how there can be a vested right not to be served. Service of process is itself a matter of adjective law, since it relates to and deals with the mechanics of practice and procedure, the legal machinery by which the substantive law is made effective.* 72 C.J.S., process, para. 25. *It deals with remedial rights, the means given for enforcing a claim, or the process and machinery by which the facts are made known to the court.* Goodrich, conflict of laws, 2d Ed., pps. 188, 189. * * *

"*Defendant then had no vested right not to be served since service, itself, is by its nature procedural and may be changed by the sovereign* whose duty it is to determine such procedure."

In the case at hand, we do not need to go so far as the Boches case goes since clearly the cause of action here arose after the effective date of the California Statute. But, certainly, it is logical to say that where an insurance company continues doing that which it knows will subject it to service of process if and when a cause of action arises under its policies, it has "consented" to place, or voluntarily placed itself under the act. In truth, the language of the act notifies such companies that to continue doing any of these acts, by mail or otherwise: (1) issuance or delivery

of a policy of insurance, (2) solicitation, (3) collection of premiums, or (4) "any other transaction of business arising out of such contracts," will subject them to service of process in suits brought in the state.

Like the New Jersey Court, service of process being procedural only, we think in our case, the Respondent, by continuing its mail activities in California with the deceased from October 1, 1949, the effective date of the California Act, to December 11, 1950, the date of Franklin's death, voluntarily and knowingly subjected itself to the terms of the California Unauthorized Insurers' Process Act.

Conclusion

Wherefore, premises considered, Petitioner prays that this Honorable Court reverse and remand this case with instructions to enter judgment for the Petitioner.

Respectfully submitted,

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APPENDIX "A"

CHAPTER 495

An act to add Article 4, comprising Sections 1610 to 1920, inclusive, to Chapter 4, Part 2, Division 1 of the Insurance Code, relating to actions in this State against nonadmitted insurers.

The people of the State of California do enact as follows:

SECTION 1. The purpose of this act is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insured or beneficiaries under insurance contracts. The Legislature declares that it is a subject of concern that nonadmitted insurers have issued policies of insurance to residents of this State physically present herein at the time of such issuance, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies; that this State has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under such policies; that if such residents are left to seek remedy in distant forums they will be, for practical purposes, without remedy. In furtherance of such state interest, the Legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 29, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

SEC. 2. Article 4, comprising Sections 1610 to 1620, inclusive, is added to the Insurance Code, to read:

Article 4. Actions against nonadmitted insurers.

1610. Any of the acts described in Section 1610, when effected in this State, by mail or otherwise, by a foreign or alien insurer which is nonadmitted at the time of the solicitation, insurance or delivery by it of contracts of insurance to residents of, or to corporations authorized to do business in, this State, is equivalent to and shall constitute an appointment by such insurer of the commissioner and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

1611. The acts referred to in Section 1610 are:

(1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts of insurance insuring (a) the lives or persons or residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State.

(2) The solicitation of applications for such contracts.

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

(4) Any other transaction of business arising out of such contracts.

1612. Such service or process may be made by delivering to and leaving with the commissioner or some person in apparent charge of his office two copies thereof. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him.

1613. Such service of process in the manner provided in Section 1612 is valid and sufficient, and gives jurisdiction over the person of such insurer, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

1614. No plaintiff or complainant shall be entitled to a judgment by default in any such action, suit or proceeding in which service of process is effected in the manner provided in Section 1612 until the expiration of 30 days from date of the filing of the affidavit of compliance.

1615. Nothing in this article contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

1616. Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such insurer shall either

(1) procure a certificate of authority to transact insurance in this State; or (2) deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action.

1617. The court in any action, suit, or proceeding, in which service of process is effected in the manner provided in Section 1612 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Section 1616 and to defend such action.

1618. Nothing in Section 1616 is to be construed to prevent a nonadmitted foreign or alien insurer from filing a motion to quash or writ or to set aside service thereof made in the manner provided in Section 1612 on the ground that such insurer has not done any of the acts described in Section 1611.

1619. In any action against a nonadmitted foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Such fee shall not exceed 12½ percent of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than twenty-five dollars ($25.00). Failure of an insurer to defend any such action shall be

deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

SEC. 3. Section 1620 is added to the Insurance Code, to read:

1620. The provisions of the preceding sections of this article shall not apply to any action, suit or proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effected in accordance with Sections 1760.5 and 1763 where such contract contains a provision designating a resident of this State or any firm of which one member is a resident of this State to be its true and lawful attorney upon whom may be served all lawful process in any such action, suit or proceeding.

In any such action, suit or proceeding arising out of any such contract of insurance, the court may require the insurer to deposit cash or securities, or file bond with good and sufficient sureties, to be approved by the court, in an amount sufficient to secure the payment of any final Judgment which may be rendered unless such insurer makes a showing satisfactory to the court that it maintains in a state of the United States funds or securities in trust or otherwise, sufficient and available to satisfy any such final judgment and that it will pay any such judgment without requiring suit to be brought thereon in the state where such securities or funds are located.

SEC. 4. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 5. This act may be cited as the Unauthorized Insurers Process Act.